

STATE OF NORTH CAROLINA  
WAKE COUNTY



BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
11 DHC 3

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THE NORTH CAROLINA STATE BAR

Plaintiff

vs.

ROBERT J. BURFORD, Attorney

Defendant

ANSWER TO COMPLAINT

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The Defendant hereby answers and otherwise responds to the various numbered Paragraphs of the Complaint and the allegations contained therein by answering, responding and otherwise alleging as follows (all references to "paragraphs" refer to the numbered paragraphs in the Plaintiff's Complaint):

**FIRST AFFIRMATIVE DEFENSE**

The complaint fails to state a claim upon which relief can be granted; accordingly the Complaint should be dismissed.

**SECOND AFFIRMATIVE DEFENSE**  
**(Lack of Subject Matter Jurisdiction)**

The Complaint should be dismissed with prejudice for reason that the North Carolina State Bar lacks subject matter jurisdiction to determine issues which are essentially questions of law or questions of legal interpretation of laws, contracts and court orders. The Constitution of the State of North Carolina reserves to the North Carolina State Courts the exclusive power to determine issues of law and this constitutionally granted power has not been and can not be constitutionally delegated to the North Carolina State Bar.

**THIRD AFFIRMATIVE DEFENSE**  
**(Unconstitutional Denial of the Defendant**  
**and his Client's Constitutionally Protected**  
**Right to Make and Enter into Binding Contracts)**

The Plaintiff's Complaint seeks to deprive or unreasonably interfere with the Defendant's constitutionally protected freedom and right to contract, and for reason of such the Plaintiff's Complaint exemplifies illegal and impermissible state action violative of the Defendant's constitutionally protected right and guaranteed freedom under the Constitution of the United States of America and the Constitution of the State of North Carolina. Accordingly, the Complaint should be dismissed with prejudice.

**FOURTH AFFIRMATIVE DEFENSE**  
**(No Probable Cause and a Constitutionally Prohibited Search)**

The Complaint should be dismissed with prejudice because its allegations are based upon purported facts and evidence that are the fruits of an illegal and unconstitutional search conducted over the Defendant's objection and in violation of the Defendant's rights under the United States Constitution to be free from unreasonable searches and seizures and searches not based upon judicially determined probable cause.

**FIFTH AFFIRMATIVE DEFENSE**  
**(Ex Post Facto Law)**

The Plaintiff's action constitutes state action and enforcement of a *de jure ex post facto* law in that it takes conduct that was innocent and legal contractual relations between the Defendant and his clients and attempts to blow these things out of proportion and criminalize the alleged misconduct when Defendant's actions were not criminal when performed. The Plaintiff's quest to brand the Defendant's innocent actions as criminal conduct subsequent to the fact is tantamount to the making and enforcement of a constitutionally prohibited *ex post facto* law under the Constitution of the United States of America and the Constitution of the State of North Carolina.

**SIXTH AFFIRMATIVE DEFENSE**  
**(Plaintiff Failed to Accord Defendant a Presumption of Innocence)**

The Complaint should be dismissed with prejudice due to the Plaintiff's failure to accord the Defendant the constitutionally mandated "presumption of innocence" before precipitously rushing to the erroneous conclusion that Defendant had engaged in criminal conduct and filing a formal complaint against him when a more cautious investigation and interpretation of the total facts and circumstances in the case clearly would have revealed that Defendant never engaged in any criminal activity against his clients and none of the clients have claimed that they were victims of a crime.

### **SEVENTH AFFIRMATIVE DEFENSE**

#### **(Defendant's Billing Vioxx Clients for Contractually Agreed Upon and Commercially Reasonable Costs and Expenses Was Not Prohibited by Judge Fallon's Order**

The Plaintiff's appears to have miss-read, miss-understood, or miss-interpreted Judge Fallon's order to conclude that it limited the Defendant's fee to 24% of the recovery and that it also prohibited the Defendant from billing the client for contractually agreed upon and commercially reasonable costs and expenses that the Defendant incurred in connection with his development and prosecution of his clients' Vioxx litigation, and no good faith factual or legal basis exists for the conclusion that Defendant's billing his clients for such costs and expenses were prohibited.

### **EIGHTH AFFIRMATIVE DEFENSE**

#### **(Judge Fallon's Order was Erroneous Under the Law of the Fourth Circuit Court of Appeals)**

The Defendant's Vioxx cases were originally filed in the North Carolina State Superior Court and later were transferred to the United States Federal District Court for the Eastern District of North Carolina. The United States District Court for the Eastern District of North Carolina is under and controlled by the law of the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit has definitively ruled that it is improper for a district court to interfere with the parties contractual relations by attempting to reduce the amount of a contingency fee agreement entered into by the parties. As the Defendant's Vioxx cases are controlled by the law of the United States Court of Appeals for the Fourth Circuit, Judge Fallon's order attempting to reduce the amount of the Defendant's contingency fee was erroneous, illegal and improper under the law of the Fourth Circuit, and is not the law in the Fourth Circuit, the circuit with original jurisdiction over the Defendant's Vioxx cases, and the Circuit where the Defendant resides and practices law,

### **NINTH AFFIRMATIVE DEFENSE**

#### **(Neither the Defendant's Fees nor his Costs were "Clearly Excessive")**

Defendant alleges as a ninth affirmative defense that his fees charged and the costs billed to each of his Vioxx clients were reasonable, fair, and not "clearly excessive" in any way under the totality of all the facts and circumstances applicable and extant to and in the case. The Defendant believes that, quite to the contrary, his fees were grossly meager under all the facts and circumstances applicable to the various cases.

**TENTH AFFIRMATIVE DEFENSE**  
**(No Intent to Defraud)**

As a tenth affirmative defense, the Defendant alleges that in all his dealings with his Vioxx clients he lacked any intent defraud anyone. No client ever gave him any indication that they felt they were being defrauded in any way. Only one Vioxx client had any problem with how his settlement was handled, and he was a client who erroneously read Judge Fallon's order in a way that led him to erroneously conclude that said order precluded the Defendant from billing for any costs and expenses. The Defendant fought hard for each of his Vioxx clients and loved, and cared for, advocated for, looked out for, and prayed for each about as much as any lawyer ever has for a client. In light of the same, the Defendant was able to obtain for each client the maximum recovery possible under the totality of all the facts and circumstances applicable to their cases. The idea of trying to intentionally and knowingly defraud or deceive any of them is repugnant to the Defendant and is something that he never would do. At no time in any of his dealings with any client did he possess a state of mind consistent with an intent to defraud. The Defendant at all times sought to be honest, fair and above board with each of his clients, and never did he possess any *mens rea* or any criminal intent to defraud. The Defendant proposed in good faith what he believed was a reasonable and fair way to resolve any issues that might arise between him and any Vioxx client regarding fees or costs. Each client was given an opportunity to be heard with regard to any opposition, questions, challenges, objections, concerns or suspicious feelings that they might have had regarding any settlement proposals made. Anyone who had any problem with anything was invited to voice their concern and were assured that every effort would be made to fairly address their concern so as to come out with a final result that was fair and acceptable to all concerned. None of the Defendant's Vioxx clients were defrauded, and none of them ever made any claim or accusation that they had been (or felt that they had been ) defrauded or that their property had been taken from them by the use of false pretenses, dishonesty, deceit or misrepresentation, and none were the victim of such.

**ELEVENTH AFFIRMATIVE DEFENSE**  
**(Defendant Complied wit Judge Fallon's Order)**

The Defendant's actions and dealings with his Vioxx clients, inclusive of his fees and costs assessed and charged, were at all times in full compliance and obedience with both the letter and the spirit of Judge Fallon's order, and the Plaintiff's claim to the contrary is false.

**TWELFTH AFFIRMATIVE DEFENSE**  
**(Mistake, Ambiguity and Ignorance)**

At all times relevant to the Plaintiff's complaint, the Defendant's actions were in full and complete compliance and obedience with and to Judge Fallon's order, and at all times it was the Defendant's intent and belief that his actions were compliant with and obedient to Judge Fallon's order. To any extent that any of the Defendant's actions ever fell short of full

compliance and obedience to Judge Fallon's order, it was not the Defendant's intent not to comply or to impermissively evade compliance, rather any such non-compliance was the result of excusable mistake, inadvertence or ignorance on Defendant's part.

**THIRTEENTH AFFIRMATIVE DEFENSE**  
**(Confusion and Ambiguity in Judge Fallon's Order)**

The Defendant alleges that, at all times relevant to the Plaintiff's Complaint, the Defendant's actions were in full and obedient compliance and obedience with and to Judge Fallon's order, and at all times it was the Defendant's intent and belief that his actions were compliant with and obedient to Judge Fallon's order. To any extent (and to such extent) as the Disciplinary Hearing Panel may interpret Judge Fallon's order differently and find that the Defendant's actions were not compliant with and obedient to Judge Fallon's order, the Defendant's failure to comply was the result of confusion and ambiguity in the order and the Defendant's good faith but possibly mistaken belief that he correctly understood the meaning and intent of the order.

**FOURTEENTH AFFIRMATIVE DEFENSE**  
**(Good Faith Difference of Opinion on**  
**What Judge Fallon's Order Meant and Intended)**

At all times relevant to the Complaint the Defendant conducted himself in accordance with what he believed were the highest ethical standards. At no time did he have even the slightest doubt that his actions were pure and well intended for the fair, equitable and mutual benefit of all concerned under the totality of the facts and circumstances applicable to the situation. The Defendant complied with all ethical standards in good faith to the best of his understanding as to what was required. The Defendant believed that his actions were compliant with all Bar rules as published and as interpreted.

The Defendant is disappointed and remorseful that his opinion regarding what constituted a permissible fee under the totality of the facts and circumstances applicable to this case was apparently different from that of the Plaintiff's. But the Defendant believes that his interpretation of both Judge Fallon's order and the Rules of Professional Responsibility are perfectly reasonable and fair, and that it is unjust for the Bar to seek to criminalize and demonize his actions merely because he reached a different reasonable conclusion than that reached by the particular investigator who investigated this case. Lawyers often have diametrically opposed opinions about the meanings and intent of facts and laws, it is unjust and a denial of due process of law and equal protection of the laws for the Plaintiff to criminalize the Defendant's opinion merely because it differs from that of the prosecutor. Even supreme court judges sometimes have diametrically opposite opinions about the meanings and intentions statutes, orders and rules. To brand the Defendant as criminal and dishonest and to seek to punish him for reason of his holding a different opinion from the Bar as to what Judge Fallon's order means and as to what constitutes a "clearly excessive" fee is unjust and unfair, serves no good public purpose and is not the kind of prosecutions in which the North Carolina State Bar rightfully ought be engaged.

## **FIFTEENTH AFFIRMATIVE DEFENSE**

### **(The North Carolina State Bar Has Not Published a Rule or Guideline Instructing as to Exactly When a Particular Fee or Cost is "Clearly Excessive")**

The North Carolina State Bar has published no rule or guideline that instructs lawyers as to exactly when a particular fee in an individual case becomes "clearly excessive" under the totality of the facts and circumstances applicable as to a particular situation. Had such a rule establishing a definition of what constitutes a "clearly excessive" fee been published, the Defendant would have complied with its limitations. There being no clear definition of exactly when a fee becomes excessive, the Defendant used his best professional judgment to charge reasonable, contractually agreed to, and commercially fair fees and costs to each client under his impression, understanding and experience of the totality of the facts and circumstances applicable to each case. Every fee and cost charged a client was one to which the client voluntarily agreed was fair and reasonable under the totality of the facts and circumstances applicable to the case. While others may have done some of things differently from the Defendant and charged greater amounts or lesser amounts here and there depending on their individual weighting of the various many factors considered in determining a final fee or cost, the Defendant and his clients with whom he settled were in agreement and in accord and satisfaction with the way they had resolved matters with regard to fees and costs.

## **SIXTEENTH DEFENSE AND RESERVATION OF RIGHTS**

Counsel for the Defendant hereby notifies the Court and Plaintiff that Defendant believes that there may be further and additional defenses and affirmative defenses available based upon additional research, investigation and discovery; and that the Defendant therefore reserves the right to amend his Answer to allege such further defenses as may be shown by his research, investigation and discovery in this matter.

## **ANSWER TO THE COMPLAINT**

The Defendant hereby answers and otherwise responds to the various numbered Paragraphs of the Complaint and the allegations contained therein by answering, responding and otherwise alleging as follows (all references to "paragraphs" refer to the numbered paragraphs in the Plaintiff's Complaint):

1. Paragraph 1 of the Complaint. Defendant lacks sufficient facts or information to know the truth of the allegations contained in Paragraph 1 of the Complaint, accordingly this allegation is denied, and is specifically denied to such extent as it purports to allege or to imply that the Complaint filed is just, fair, or meritorious. It is Admitted that the Plaintiff is a body duly organized under the laws of North Carolina.

2. Paragraph 2 of the Complaint is Admitted.
3. Paragraph 3 of the Complaint is Admitted.
4. The allegations of Paragraph 4 of the Complaint are Admitted.
5. The allegations of Paragraph 5 of the Complaint are Admitted.
6. The allegations of Paragraph 6 of the Complaint are Admitted.
7. The allegations of Paragraph 7 of the Complaint are Admitted generally to the extent that it seeks to quote (out of context) an isolated part of the Court's order, but is specifically Denied to the extent that it implies or suggests that the quote describes any of the Defendant's Vioxx clients. The Defendant's Vioxx clients' cases were prepared and developed for trial, not for settlement. Thus, a great deal more work was required for them than for the majority of the Vioxx cases which were not prepared or developed for trial. The Defendant's Vioxx cases were ones known as "lone pine" cases. "Lone pine" cases were ones that followed a litigation path and did not enter the proposed global settlement of the mass tort litigation until very late in the litigation process. The allegation is further denied to the extent that the allegation implies that once Defendant's clients were entered into the Vioxx settlement hardly anything was left to do because of what had been done by the "common benefit counsel". The "common benefit counsel" did nothing on the Defendant's individual Vioxx clients' individual cases. All work on the Defendant's Vioxx clients' cases was done by the Defendant's team and its agents.
8. Paragraph 8 of the Complaint is Admitted to the extent as it attempts to describe the court's allocations made to the "common benefit counsel" and to the "common benefit expenses" charged by the common benefit counsel. Except as specifically admitted, this Paragraph 8 and its implications are specifically Denied.
9. Paragraph 9 of the Complaint is Admitted to the extent that it alleges that the federal court limited individual attorneys' fees in the Vioxx litigation to 24%. Except as specifically Admitted herein, the allegations of Paragraph 9 are Denied and specifically Denied to the extent that it is intended to imply or to suggest that the Court's order denied the Defendant the right to recover the full amount of any costs or expenses.
10. The allegations of Paragraph 10 of the Complaint are Admitted
11. The allegations of Paragraph 11 of the Complaint are Denied. The Defendant provided each client with whom he met a full and fair explanation and discussion of each and every cost and expense deducted or assessed.
12. The allegations of Paragraph 12 of the Complaint are Denied, except that it is admitted that the Defendant collected a 24% attorney fee.

13. The allegations of Paragraph 13 of the Complaint are Denied as stated. It is admitted, however, that Defendant charged a 24% fee and that he charged clients the contractually agreed upon and commercially reasonable costs to which the clients agreed and accepted as reasonable and fair under the totality of the unique facts and circumstances applicable to their Vioxx litigation and the outstanding results obtained. In no case did Defendant charge any client an attorney's fee greater than 24% of the client's recovery. Except as specifically admitted, the allegations of Paragraph are denied.
14. The allegations of Paragraph 14 of the Complaint are Admitted.
15. The allegations of Paragraph 15 of the Complaint are Denied. The Defendant charged each client for paralegal services the amount to which the Defendant and each client mutually agreed was fair and reasonable for the services provided under the circumstances that they were provided and in light of the risk assumed and results obtained.
16. It is admitted that Defendant paid the paralegal approximately \$154,000, except as specifically admitted the allegations of Paragraph 16, together with their implications, are Denied.
17. The allegations of Paragraph 16 of the Complaint are Denied. At no time did the Defendant present the paralegal invoices as being invoices that were paid by Defendant to the paralegal at the hourly rate stated in the invoice, but rather was the amount and the rate at which the Defendant was billing the client for paralegal services. Each client was specifically informed that the amount that the Defendant paid the paralegal was less than \$100 per hour on the invoice.
18. The allegations of Paragraph 18 of the Complaint are Admitted with the express proviso and understanding that Burford requested the paralegal to prepare for him time sheet invoices for the work performed on the Vioxx clients, and he instructed the paralegal to prepare the invoices showing a proposed billing rate of \$100 per hour, as that was the rate that Defendant considered as reasonable and fair for him to bill his clients in light of the benefits conferred by the paralegal services provided and Buford's substantial risks incurred by his advance payment of the paralegal without any assurance that his funds advanced ever would be recouped.
19. The allegations of Paragraph 19 of the Complaint are Admitted with the express limitation, understanding and proviso that Burford has never represented to anyone or claimed that he paid the paralegal on an hourly basis or that the paralegal's monthly salary from him amounted to \$100.00 per hour. Except as specifically admitted herein inclusive of all limitations, understandings and provisos, Paragraph 19 is Denied.



20. The allegations of Paragraph 20 of the Complaint are Denied. The invoices to the client showed what Burford considered to be a fair and reasonable billing to the client for the paralegal services provided in support of the litigation. At no time did Defendant ever represent to a client or anyone or claim to any client or to anyone else that the \$100 an hour amount billed to the client was the amount or the rate actually paid by Defendant for the valuable and essential paralegal services provided or that it was the amount that the paralegal actually billed the Defendant. Each client was explained and informed that the \$100 rate included a mark up or multiplier factor in recognition of the fact that the money advanced to pay for same was money placed at risk and money that had been outstanding for almost seven (7) years without payment of any interest and with substantial risk that it possibly might never be re-paid. The clients accepted that the rate charged as fair and reasonable and not excessive in light of the results obtained and the totality of factors applicable to the case.
21. The allegations of Paragraph 21 of the Complaint are Admitted.
22. The allegations of Paragraph 22 of the Complaint are Denied as alleged. It is admitted that the Defendant, with the client's consent, charged some of his clients a reasonable and fair fee as a charge for the expert witness services that the Defendant procured and provided to them in support and advancement of their cases. The amount charged to each client as a fee for procurement of expert witness services was in every respect reasonable, fair and substantially below prevailing market rates. As each client was charged a below market rate for the expert witness services obtained on their behalf, and as each client consented and agreed to the amount and the manner in which they were billed for expert witness services retained for their case, the parties were in accord with the Defendant's assessment and billing of this cost as billed. The Defendant apportioned the fees as he felt was equitable and fair under the totality of the facts and circumstances applicable to the situation at hand.
23. The Defendant Admits that, with the client's consent, he charged one of his client's travel costs for travel and lodging associated with his case, but did not apportion that cost amongst all of the Vioxx clients, nor did any of the Vioxx clients have any objection to Defendant's not allocating the said travel costs amongst them nor did any client request that any such allocation occur. Further the Defendant denies that he was under any absolute obligation to apportion the expense in any particular way. The Defendant apportioned the travel expense as he believed was equitable and fair under the totality of all facts and circumstances applicable to the case. Each client at the time of settlement was given opportunity to object to, question or contest any item of the settlement statement that they felt was unfair, unreasonable or excessive in light of the totality of facts and circumstances applicable to their individual case, and each expressed satisfaction with the proposed settlement and with the professionalism with which their case had been handled. If any client had had any objection or dissatisfaction with anything proposed or stated by Defendant

in the settlement statement or elsewhere, they were given opportunity to object, to question, and to counter-propose, and if any Vioxx client had lodged any objection to any item of cost or expense billed, their concerns would have been fairly addressed or submitted to fee arbitration. Except as specifically Admitted here (inclusive of all explanation contained herein), the allegations of Paragraph 23 of the Complaint are Denied.

24. The Defendant Admits that he, with the full knowledge, consent and agreement of his Vioxx clients, charged at least \$62, 460.00 for the cost of publication of notice informing them of the harm that Vioxx caused, the potential liability of the manufacturer, and the potential that they might have a meritorious claim for recovery of damages for the heart attack and stroke injuries caused them as a result of their ingestion of Vioxx. Without the Defendant's having notified, informed and publicized to them the fact that their injuries might have been caused by Vioxx and that a legal remedy might existed for them, Defendant's Vioxx clients likely never would have known about the dangers of Vioxx or that they had a claim for legal redress, or who they could call for help if they thought they had been injured by ingestion of Vioxx. The Defendant's Vioxx clients believed that the Defendant's advertising of these facts directly benefitted them and that it was a cost for which the Defendant rightfully and fairly should be reimbursed, for had the Defendant not spent his money paying for advertisements to inform and notify them of their rights and of the existence of a possible legal redress for their possibly Vioxx induced injuries, they likely might never have known of the existence of such. For reason of the foregoing, among other things, except as specifically admitted herein (inclusive of the explanation provided herein), the Defendant Denies the allegations of Paragraph 24 of the Complaint.

25. The allegations of Paragraph 25 of the Complaint are Denied.

26. The allegations of Paragraph 26 of the Complaint are Denied.

27. The allegations of Paragraph 27 of the Complaint are Denied.

28. The allegations of Paragraph 28 of the Complaint are Denied.

THEREFORE, the Defendant alleges that none of his actions taken in the context of the totality of the facts and circumstances, in which they occurred, constituted a violation of any Rule of the Rules of Professional Conduct in effect at the time of his actions. The Defendant alleges that all his actions and dealings with his clients were done in good faith and in an innocent attempt to do what he and his clients believed was just, fair and equitable to each other under the totality of all facts and circumstances applicable to the situation in which they found themselves. The Defendant specifically denies that he ever did anything that was knowingly or intentionally dishonest, unfair, deceitful, or fraudulent. The Defendant was honest and

forthcoming in his dealings with each of his clients and always tried to be fair to them under the totality of all the facts and circumstances applicable to their situation. Further the Defendant offered and was amenable to pursuing the Bar's Fee Dispute Resolution Program with any client who felt they were being charged a clearly excessive fee or otherwise being treated wrongly, unfairly or unprofessionally under the totality of the facts and circumstances applicable to their case and situation.

WHEREFORE, Defendant prays that:

1. No Disciplinary action be taken against Defendant as he has not engaged in conduct calling for discipline under N.C.G.S. §84-28 (c) and N.C.A.C. 1B § .0114.
2. This proceeding be dismissed with prejudice, and any remaining dispute existing between Defendant and any Vioxx client be referred to Fee Dispute Resolution for resolution.
3. The file in this case be sealed.
4. The filing of this complaint be expunged from the Defendant's record
5. Plaintiff be taxed with the administrative fees and with actual costs permitted by law in connection with the proceeding; and
6. For such other and further relief as the Hearing Panel deems appropriate.

This the 18<sup>th</sup> day of March 2011.

ROBERT J. BURFORD & ASSOCIATES, PLLC

BY Robert J. Burford  
Robert J. Burford  
Attorney for Plaintiff  
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N.C. Bar No. 9077

#### CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this document in the above entitled action upon all other parties to this cause by:

- ☒ Hand delivering a copy hereof to the attorney for each said party.
- ☐ Depositing a copy hereof, postage prepaid, in the United States Mail, properly addressed to the attorney for each said party.
- ☐ Facsimile transmission to the attorney for each party.

This the 18<sup>th</sup> day of March, 2011  
By Robert J. Burford